

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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RONALD SATISH EMRIT,

Plaintiff(s),

v.

NATIONAL INSTITUTES OF HEALTH,
et al.,

Defendant(s).

Case No. 2:14-CV-1502 JCM (VCF)

ORDER

Presently before the court are seven motions filed by *pro se* plaintiff Ronald Satish Emrit. Plaintiff filed motions to proceed *in forma pauperis* (doc. # 2), for preliminary injunction (doc. #3), for declaratory judgment (doc. # 6), for summary judgment (doc. # 7), for default judgment (doc. # 8), and in limine (doc. # 11). Defendants National Institutes of Health (“NIH”), Center for Disease Control (“CDC”), Food and Drug Administration (“FDA”), and U.S. Department of Health and Human Services (“DHHS”) have not filed responses to any of plaintiff’s motions.

Also before the court are Magistrate Judge Ferenbach’s report and recommendation regarding plaintiff’s motion to proceed *in forma pauperis*. (Doc. # 3). The magistrate judge recommends that plaintiff’s application to proceed *in forma pauperis* be denied. (Doc. # 3). Plaintiff filed an objection. (Doc. # 4). Defendants did not file any objections or responses and the deadline to do so has passed.

I. Background

Plaintiff, a graduate of St. Thomas University School of Law, was diagnosed with hepatitis C in 2004. (Doc. # 1). The diagnosing doctor informed plaintiff that his hepatitis C could be cured with a six-month treatment of interferon and ribavirin. (Doc. # 1). From 2004

1 through present day, plaintiff has “consistently asked [defendants] to help him with regards to
 2 getting this six-month treatment.” (Doc. # 1). Defendants did not. (*Id.*). On September 15,
 3 2014, plaintiff initiated the instant action seeking \$40,000,000. (*Id.*).

4 Plaintiff’s complaint repeats essentially verbatim the same one paragraph. (Doc. # 1).
 5 Plaintiff states essentially that, because defendants failed to refer him to a gastroenterologist,
 6 hepatologist, and/or health management organization, the defendants have placed the plaintiff at
 7 a “higher risk of dying young from Hepatitis C, cirrhosis, liver cancer, and/or liver failure.”
 8 (Doc. # 1).

9 Because defendants failed to assist plaintiff with getting treatment for his hepatitis C,
 10 plaintiff asserts defendants violated the Americans with Disabilities Act of 1990 (“ADA”), Title
 11 VII of the Civil Rights Act of 1964, 42 U.S.C. § 1983, the Affordable Care Act (“ACA”), and
 12 the Health Insurance Portability and Accountability Act (“HIPAA”). (Doc. # 1). Plaintiff
 13 further asserts that defendants have violated state causes of action of negligence, material breach
 14 of contract, and intentional infliction of emotional distress. (Doc. # 1).

15 **II. Discussion**

16 As an initial matter, the court recognizes that the plaintiff is appearing *pro se* and must
 17 therefore be held to less stringent standards. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (“A
 18 document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully
 19 pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.”)
 20 (internal quotations and citations omitted). However, “*pro se* litigants in the ordinary civil case
 21 should not be treated more favorably than parties with attorneys of record.” *Jacobsen v. Filler*,
 22 790 F.2d 1362, 1364 (9th Cir.1986).

23 The court notes that plaintiff alleges to be a graduate of St. Thomas University School of
 24 Law. Plaintiff does not, however, allege to be admitted to practice in any state.

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1 A. *Plaintiff's motion to proceed in forma pauperis (doc. # 2) and Magistrate Judge*
 2 *Ferenbach's report and recommendation (doc. # 3)*

3 On October 1, 2014, plaintiff filed a motion to proceed *in forma pauperis*. (Doc. # 2).
 4 Magistrate Judge Ferenbach filed a report and recommendation that plaintiff's application to
 5 proceed *in forma pauperis* be denied. (Doc. # 3). The court considers whether plaintiff's motion
 6 to proceed *in forma pauperis* should be granted.

7 This court "may accept, reject, or modify, in whole or in part, the findings or
 8 recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). Where a party timely objects
 9 to a magistrate judge's report and recommendation, then the court is required to "make a *de novo*
 10 determination of those portions of the [report and recommendation] to which objection is made."
 11 28 U.S.C. § 636(b)(1).

12 Under 28 U.S.C. § 1914(a), a \$400.00 filing fee is required to commence a civil action in
 13 federal court. The court may authorize an action to begin without prepayment of fees and costs
 14 by a person who submits an affidavit that includes a statement showing the person is unable to
 15 pay such costs. *See* 28 U.S.C. § 1915(a)(1). The standard governing *in forma pauperis*
 16 eligibility under 28 U.S.C. § 1915(a)(1) is "unable to pay such fees or give security therefore."
 17 Determining whether a plaintiff is unable to pay, and therefore permitted to proceed *in forma*
 18 *pauperis*, is within the discretion of the presiding judge, based on the information submitted by
 19 the plaintiff. *See, e.g., Fridman v. City of New York*, 195 F. Supp. 2d 534, 536 (S.D.N.Y.), *aff'd*,
 20 52 Fed. App'x 157 (2nd Cir. 2002).

21 Plaintiff notes in his application to proceed *in forma pauperis* that he drives a Mercedes
 22 Benz C-230 and recently inherited \$31,000.00 from his aunt's estate. Plaintiff, however, asserts
 23 that he cannot afford to pay the filing fee because he has \$200,000.00 of law school debt and
 24 lives with his ex-girlfriend who depends on him to pay the electricity, gas, and DIRECTV bills.
 25 The magistrate judge found that plaintiff is capable of paying the filing fees and denied
 26 plaintiff's motion to proceed *in forma pauperis*.

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1 Plaintiff objects to the magistrate judge's recommendation. Plaintiff states that he
 2 consistently earns lower than the poverty threshold, that his Mercedes Benz has been appraised
 3 by Kelley Blue Book at approximately \$1,500, and that he has spent the bulk of his inheritance,
 4 which he received over a year ago. (Doc. # 4).

5 The court agrees with the magistrate judge that plaintiff has the ability to pay the filing
 6 fee. Accordingly, the court will adopt the magistrate judge's recommendation to deny plaintiff's
 7 motion to proceed *in forma pauperis*.

8 *B. Plaintiff's motion for preliminary injunction (doc. # 5)*

9 The Supreme Court has stated that courts must consider the following elements in
 10 determining whether to issue a preliminary injunction: (1) a likelihood of success on the merits;
 11 (2) likelihood of irreparable injury if preliminary relief is not granted; (3) balance of hardships;
 12 and (4) advancement of the public interest. *Winter v. N.R.D.C.*, 555 U.S. 7, 20 (2008). "An
 13 injunction is a matter of equitable discretion" and is "an extraordinary remedy that may only be
 14 awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 22, 32. The test
 15 is conjunctive, meaning the party seeking the injunction must satisfy each element.

16 Plaintiff's motion for preliminary injunction is two hand-written paragraphs. (Doc. # 5).
 17 Plaintiff asserts that he seeks a preliminary injunction to "have the court mandate that all four
 18 defendants assist the plaintiff with regards to curing the Hepatitis C virus (HCV) by helping him
 19 find a hepatologist and/or gastroenterologist to administer a consecutive six-month treatment of
 20 interferon and ribavirin." (Doc. # 5).

21 Plaintiff's motion for preliminary injunction does not address a single *Winter* factor for
 22 any of his numerous claims. Accordingly, plaintiff does not make any showing, let alone a clear
 23 showing, that he is entitled to injunctive relief. Plaintiff's motion for preliminary injunction will
 24 be denied.

25 *C. Plaintiff's motion for summary judgment (doc. #7)*

26 The Federal Rules of Civil Procedure provide for summary judgment when the pleadings,
 27 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if
 28 any, show that "there is no genuine issue as to any material fact and that the movant is entitled to

1 a judgment as a matter of law.” Fed. R. Civ. P. 56(a). A principal purpose of summary judgment
2 is “to isolate and dispose of factually unsupported claims.” *Celotex Corp. v. Catrett*, 477 U.S.
3 317, 323–24 (1986).

4 In determining summary judgment, a court applies a burden-shifting analysis. “When the
5 party moving for summary judgment would bear the burden of proof at trial, it must come
6 forward with evidence which would entitle it to a directed verdict if the evidence went
7 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the
8 absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp. Brokerage*
9 *Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

10 In contrast, when the nonmoving party bears the burden of proving the claim or defense,
11 the moving party can meet its burden in two ways: (1) by presenting evidence to negate an
12 essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
13 party failed to make a showing sufficient to establish an element essential to that party’s case on
14 which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If
15 the moving party fails to meet its initial burden, summary judgment must be denied and the court
16 need not consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S.
17 144, 159–60 (1970).

18 If the moving party satisfies its initial burden, the burden then shifts to the opposing party
19 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*
20 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the
21 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient
22 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’
23 differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809
24 F.2d 626, 631 (9th Cir. 1987).

25 In other words, the nonmoving party cannot avoid summary judgment by relying solely
26 on conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040,
27 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the
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1 pleadings and set forth specific facts by producing competent evidence that shows a genuine
2 issue for trial. *See Celotex Corp.*, 477 U.S. at 324.

3 At summary judgment, a court's function is not to weigh the evidence and determine the
4 truth, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*,
5 477 U.S. 242, 249 (1986). The evidence of the nonmovant is "to be believed, and all
6 justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the
7 nonmoving party is merely colorable or is not significantly probative, summary judgment may be
8 granted. *See id.* at 249–50.

9 Plaintiff's motion for summary judgment is two hand-written paragraphs. Plaintiff's sole
10 assertion is that there is "no 'genuine issue of material fact' with regards to whether or not all
11 four of the defendants owed a duty to the plaintiff to help him" cure his hepatitis C by "treating
12 him with interferon and ribavirin for a period of six consecutive months." (Doc. # 7). Based on
13 only this statement and no supporting evidence or documents, plaintiff asserts that summary
14 judgment is appropriate.

15 Plaintiff does not address or discuss a single element necessary to meet the prima facie
16 case for any of the eight claims he asserts in his complaint. The court does not feel it necessary
17 to painstakingly outline the elements to establish each prima facie case for plaintiff's eight
18 causes of action.¹

19 Plaintiff has failed to meet the standard for the court to grant him summary judgment.
20 Plaintiff submits no evidence to support his claim that "all four defendants owed [him] a duty" to
21 help him cure his hepatitis C. (Doc. # 1). Accordingly, plaintiff's motion for summary judgment
22 with respect to all causes of actions will be denied.

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26 ¹ Plaintiff asserts violations under the Americans with Disabilities Act of 1990 ("ADA"), Title
27 VII of the Civil Rights Act of 1964, 42 U.S.C. § 1983, Affordable Care Act ("ACA"), Health
28 Insurance Portability and Accountability Act ("HIPAA") as well as state law claims for
negligence, material breach of contract, and intentional infliction of emotional distress. (Doc. # 1).

1 *D. Plaintiff's motion for declaratory judgment (doc. # 6)*

2 The Declaratory Judgment Act provides that “any court of the United States, upon the
3 filing of an appropriate pleading, may declare the rights and other legal relations of any
4 interested party seeking such declaration.” 28 U.S.C. § 2201(a). Under the Declaratory
5 Judgment Act, district courts have “substantial discretion” to decline to exercise jurisdiction over
6 an action for declaratory relief. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995).

7 As an initial matter, declaratory relief is a remedy and not a separate cause of action. *See*
8 *Freeto v. Litton Loan Serv., LP*, no. 3:09-cv-754, 2011 WL 112183, at *3 (D. Nev. Jan. 12,
9 2011) (dismissing claims for declaratory relief and permanent injunction because those remedies
10 may only “be afforded to a party after he has sufficiently established and proven his claims”); *see*
11 *also Stock West, Inc. v. Confederated Tribes of Coville Reservations*, 873 F.2d. 1221, 1225 (9th
12 Cir. 1989) (holding that declaratory judgment does not create substantive cause of action).

13 Plaintiff's motion for declaratory judgment is also two hand-written paragraphs. (Doc. #
14 6). Plaintiff asks the court for a declaratory judgment that all four defendants owed him a duty to
15 assist him with finding a hepatologist and/or gastroenterologist to administer the appropriate
16 treatment to cure his hepatitis C. (Doc. # 6). Because plaintiff's motion for summary judgment
17 is denied, plaintiff's motion for declaratory judgment is also denied.

18 *E. Plaintiff's motion for default judgment (doc. # 8)*

19 Default judgment is appropriate “when a party against whom a judgment for affirmative
20 relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or
21 otherwise” Fed. R. Civ. P. 55(a). Federal Rule of Civil Procedure 55(b)(2) provides that “a
22 court may enter a default judgment after the party seeking default applies to the clerk of the court
23 as required by subsection (a) of this rule.” Fed. R. Civ. P. 55(b)(2).

24 Obtaining a default judgment entails two steps: “first, the party seeking a default
25 judgment must file a motion for entry of default with the clerk of a district court by
26 demonstrating that the opposing party has failed to answer or otherwise respond to the
27 complaint, and, second, once the clerk has entered a default, the moving party may then seek
28 entry of a default judgment against the defaulting party.” *See Teller v. Dogge*, 2:12-cv-591-

JCM-GWF, 2014 WL 4929413, *1 (D. Nev. September 30, 2014) (citing *UMG Recordings, Inc. v. Stewart*, 461 F. Supp. 2d 837, 840 (S.D. Ill. 2006)). Where a party has not been properly served, there is no basis for a court to enter default judgment. *Id.* (citing *Fairly v. Potter*, 2003 WL 403361, *4 (N.D. Cal. 2003)).

The choice whether to enter a default judgment lies within the discretion of the trial court. *Aldabe v. Aldabe*, 616 F.3d 1089, 1092 (9th Cir. 1980). In the determination of whether to grant a default judgment, the trial court should consider the seven factors articulated in *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). These factors are: (1) the possibility of prejudice to plaintiff, (2) the merits of the claims, (3) the sufficiency of the complaint, (4) the amount of money at stake, (5) the possibility of a dispute concerning material facts, (6) whether default was due to excusable neglect, and (7) the policy favoring a decision on the merits. *Id.* In applying these *Eitel* factors, “the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true.” *Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977); see Fed. R. Civ. P. 8(d).

The clerk has not entered default in this case. Accordingly, plaintiff has not met the first two steps necessary for obtaining a default judgment. Accordingly, plaintiff’s motion for default judgment will be denied.

F. Plaintiff’s motion in limine (doc. # 11)

Plaintiff’s motion in limine is two hand-written paragraphs. (Doc. # 11). Plaintiff moves to have certain medical documents from plaintiff’s gastroenterologist entered into evidence. Plaintiff seeks to enter these medical documents into evidence to show that he is suffering from hepatitis C and is showing signs of steatosis of the liver. (Doc. # 11). Plaintiff has included the proposed exhibits in a sealed docket entry. (Doc. # 12). Plaintiff asserts that these documents should be entered into evidence as an exception to the hearsay rule as a “statement of then-existing physical condition.” (Doc. # 11).

The court declines to rule on this issue in a motion in limine. The parties may address this issue at trial, should the case progress to that point.

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1 Accordingly,

2 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Magistrate Judge
3 Ferenbach's report and recommendation (doc. # 3) be, and the same hereby are, ADOPTED.
4 Plaintiff's motion to proceed *in forma pauperis* (doc. # 2) is DENIED.

5 IT IS FURTHER ORDERED that plaintiff must submit the filing fee to the Clerk's
6 Office by **Friday, February 13, 2015**, or this matter will be DISMISSED.

7 IT IS FURTHER ORDERED that plaintiff's motions for preliminary injunction (doc.
8 #5), for declaratory judgment (doc. # 6), for summary judgment (doc. # 7), for default judgment
9 (doc. # 8), and motion in limine (doc. # 11) be, and the same hereby are, DENIED.

10 DATED January 28, 2015.

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UNITED STATES DISTRICT JUDGE